FILED
MAR 6 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1941.

No. 1020

HELEN VAN ZILE ANTHONY, WILLIAM D. SMITH, and JESSE VAN ZILE ANTHONY as Executor of the Will of FANNIE J. ANTHONY,

Petitioners,

v.

UNITED STATES TRUST COMPANY OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

ELI J. BLAIR,
Of Counsel for Petitioners.

THE REPORTER COMPANY, Inc., New York City
1942

Subject Index.

	Page
Petition	1
Opinions Below	2
Jurisdiction	2-3
Questions Presented	3-4
Statement	4-15
Specification of Errors	16-19
Reasons for Granting Writ	20
Brief in Support of Petition	21-48

I.

The decision and decree of the Surrogate having been rendered on issues not within and not responsive to the pleadings before that Court and not litigated, and having been made without any pleadings upon which to base them and upon pleadings in an action in the New York Supreme Court without jurisdiction, are void under the due process provision of the United States Constitution 21-35

II.

The petitioners involved were deprived of any trial of the issues framed by the pleadings in the Supreme Court action, and without notice were deprived of their property, contrary to the due process of law provision of the Constitution of the United States 36-44

III.

The Trust Company proved that the petitioners involved have a meritorious cause of action, and proved the main facts thereof 44-48

IV.

Page

The application for a writ of certiorari to the Surrogates' Court, New York County, should be granted 48

Appendix: Text of essential portion of New York statutes and rule relied on ..... I-III

TABLE OF CASES.

Matter of Allen, 142 Misc. 113, 117-120 45
Matter of Andrews, 172 Misc. 373 22
Barnes v. Railway, 122 U. S. 1, 14 34
Barnes v. Southfield Beach Co., 202 N. Y. 301 45
Bostwick v. Burnett, 74 N. Y. 317, 319 46
Brinckerhoff-Faris Co. v. Hill, 281 U. S. 673, 678-680 ..... 21, 44
Buckingham v. Vincent, 23 App. Div. 238, 240 46
Matter of Cary, 77 Misc. 602, 603-604, affirmed 155 App. Div. 946 22
Chandler v. Chapman, 218 App. Div. 773 46
Coe v. Armour Fertilizer Works, 237 U. S. 413, 419, 426 ..... 21, 30, 39, 41
Colson v. Pelgram, 259 N. Y. 370, 374, 375 23
In re Conservative Mortgage & Guaranty Co., 24 Fed. (2) 38, 41 ..... 21, 34
Chisholm v. Gilmer, 299 U. S. 99, 102 26
Dambmann v. Schulting, 75 N. Y. 55, 59 45
Matter of Denbosky, 245 App. Div. 93 ..... 22, 47
Matter of De Pierris, 79 Hun 279 22
Matter of Doelger, 254 App. Div. 178, 182, aff'd 279 N. Y. 646 22
Farmers' Loan & Trust Company v. Lake St. R. D. Co., 177 U. S. 51, 61 23
Fisher v. Title Guarantee & Trust Company, 262 App. Div. 293, 296, 299; affirmed 287 N. Y. 275 45
Fosdick v. Town of Hempstead, 126 N. Y. 651, 652 43
Frank v. Mangum, 237 U. S. 309, 326 ..... 36, 40, 39
Matter of Franklin, 153 Misc. 110, 111 ..... 10, 24
Georgia Ry. & El. Co. v. Decatur, 295 U. S. 165, 171 ..... 36, 41
Matter of Harkness, 119 Misc. 361, 362 25
Hasbrouck v. Van Winkle, 261 App. Div. 679 45
Matter of Hearn, 158 Misc. 371, 372 22
Hendryx v. Perkins, 114 Fed. 801, 806, 52 C. C. A. 435 35
Jensen v. Union Pac. Ry. Co., 6 Utah 253 (4 L. R. A. 724) 36, 38
Joseph v. Herzig, 198 N. Y. 456, 461, 463 ..... 22, 47
Matter of Kelly v. Langevin, 153 App. Div. 322, 323 22
Matter of Kirkman, 143 Misc. 342, 343 22
Laverty v. Snethen, 68 N. Y. 522, 524 45
Matter of Lawyers Title and Guaranty Co., 157 Misc. 516, 519 46
Ludwig v. Baumgart, 48 App. Div. 613 23
MacDonnell v. Buffalo L. T. & S. D. Co., 193 N. Y. 92, 101 46
Malmud v. Blackman, 251 App. Div. 192, 194 45
Mance v. Hossington, 205 N. Y. 33 46
McManus v. Biddison, 152 Misc. 239, 241, affirmed 242 App. Div. 623 45

Page

Mendelson v. Boettger, 257 App. Div. 165, 169-170, 171; affirmed 281 N. Y. 747 ---------- 45
Meredith v. First Trust Co. of Albany, 260 App. Div. 517, 520 (supra), 22, 47
Missouri v. Gehner, 281 U. S. 313, 320 ---------- 44
National Surety Company v. Manhattan Mortgage Company, 185 App. Div. 733, 739; affirmed 230 N. Y. 545 ---------- 45
Matter of New York Title and Mortgage Co., 160 Misc. 67, 73-74 ---------- 46
Ohio Tel. Co. v. Commission, 301 U. S. 292, 304-305 ---------- 36, 38
Palko v. Connecticut, 302 U. S. 319, 327 ---------- 36, 38
People v. Patrick, 183 N. Y. 52, 53 ---------- 43
Matter of Pedrette, 153 Misc. 106 ---------- 10, 24
Matter of People (Westchester Tit. & T. Co.), 268 N. Y. 432 ---------- 46
Pepper v. Litton, 308 U. S. 295, 303 ---------- 25
Matter of Pfersich, 153 Misc. 609 ---------- 9, 24
Putnam v. Day, 89 U. S. (22 Wall.) 60, 66 (22 L. Ed. 764) ---------- 35
Reynolds v. Stockton, 140 U. S. 254, 264, 265, 268 ---------- 21, 30, 31, 34, 35
Saunders v. Shaw, 244 U. S. 317 ---------- 36, 41, 44
Schmid v. Garfield National Bank, 64 Hun 298, 300 ---------- 46
Seeley v. Osborne, 220 N. Y. 416, 421 ---------- 46
Smith v. U. S. Trust Company, New York Law Journal, September 26, 1940, p. 798, Levy, J. ---------- 13
Standard Oil Company v. Missouri, 224 U. S. 270, 281-282 ---------- 21, 33, 35
Stickles v. Bernier, 139 Misc. 405, 409 ---------- 46
Stiebel v. Grosberg, 202 N. Y. 266 ---------- 44
Stuart v. Palmer, 74 N. Y. 183, 191 ---------- 36, 39, 41
Trua v. Corrigan, 257 U. S. 312, 332 ---------- 36, 37
T. G. W. Realties, Inc., v. Long Island Bird Store, Inc., 151 Misc. 918, 924 ---------- 47
U. S. v. Goldstein, 271 Fed. 838, 845 ---------- 21, 35
Vicksburg v. Henson, 231 U. S. 259, 269 ---------- 26
Walker v. Sauvinet, 92 U. S. 90, 93 ---------- 39
J. G. White & Co. v. Ball Engineering Co., 298 Fed., also 709, 713; certiorari denied 265 U. S. 596 ---------- 46
Windsor v. McVeigh, 93 U. S. 274, 282 ---------- 21, 33, 34, 36, 40
Wright v. Delafield, 25 N. Y. 266, 270 ---------- 25
Wuchter v. Pizzutti, 276 U. S. 13, 24, 25 ---------- 39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No.

HELEN VAN ZILE ANTHONY, WILLIAM D. SMITH, and JESSE VAN ZILE ANTHONY, Executor of the will of Fannie J. Anthony,

Petitioners,

v.

UNITED STATES TRUST COMPANY OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

The petitioners, Helen Van Zile Anthony, William D. Smith, and Jesse Van Zile Anthony, Executor of the will of Fannie J. Anthony, pray that a writ of certiorari issue to review the decision and order of the Court of Appeals of the State of New York affirming a decree of the Surrogate's Court, New York County, of May 17, 1940, after its affirmance by the Appellate Division of the Supreme Court, First Department of the State of New York and to review the decree of the Surrogate's Court of the State of New York, New York County entered on December 8th, 1941 upon the order on the remittitur and mandate of the Court of Appeals of the State of New York made and entered in the office of the Clerk of the Court of Appeals on November 28, 1941.

Opinions Below.

The Surrogate rendered an opinion reported in 173 Misc. 1042, and set forth in the record (R. 263-269). The majority of the Appellate Division of the Supreme Court, First Department rendered no opinion. A dissenting opinion was rendered, concurred in by two Justices, reported in 262 App. Div. 703 and set forth in the record (R. 278-284). The Court of Appeals on affirmance rendered no opinion (287 N. Y. 101 [mem.]) and denied reargument without opinion on the constitutional questions presented on the original argument on January 15, 1942 (287 N. Y. [mem.]) (R. 290-295).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, on the basis that the petitioners Helen Van Zile Anthony and William D. Smith were deprived of a trial of the issues of an action pending in the Supreme Court, New York County, and of the property involved therein contrary to the due process provision of the Constitution of the United States in that the Surrogate's Court, New York County decided the issues of said action under the pleadings therein without notice and jurisdiction, on a hearing limited by the pleadings in such Surrogate's Court to the issue of the jurisdiction of that court of a proceeding therein brought, and incorporated the decision of said Supreme Court issues in a decree purporting to settle the accounts of a trustee not in issue and not before the Court. The claim is on the further basis that in said decision the Surrogate made findings of fact against the petitioner, Jesse V. Z. Anthony, as Executor of a life tenant though not a party to said action and having no interest in the account, and that all the petitioners

were adjudged to pay costs of a contested accounting in said decree on the hearing so limited and by the judgments of affirmances thereof, and were thus deprived of their property within the due process provision of the Fourteenth Amendment of the Constitution of the United States.

Questions Presented.

Can the Surrogate's Court, New York County on a hearing limited by the pleadings filed therein to the trial and decision of an issue demanding dismissal of the proceedings therein, try impromptu, without notice, and without jurisdiction and over objection the issues in a conversion action pending in the Supreme Court, New York County, on the pleadings in said action, and incorporate the decision of said issues thus rendered in a decree purporting to settle the accounts of a trustee which accounts were not in issue by any pleadings at the time of said hearing so limited, and were expressly withheld from settlement until the occurrence of a subsequent contingent event, without depriving the parties to said action of their property involved in said action under the due process provision of the Fourteenth Amendment of the Constitution of the United States?

Can the said Surrogate's Court on a hearing so limited, make findings of fact on the issues in said action against the executor of a life tenant and punitively adjudge in said decree so made that the executor of such life tenant personally pay the costs of a contested accounting, said executor having no interest in said accounting or conversion action and not a party to the action, and having admittedly been paid the income due the life tenant, and no claim having been made to the contrary, and to pay the costs on affirmances on said patently void decree, and can the other petitioners also be adjudged to per-

sonally pay the costs awarded in the above described decree and judgments without violating their rights and taking their property under the due process provision of the Constitution of the United States?

Statement.

On October 13, 1935, petitioner, Helen Van Zile Anthony, became entitled to one-third of the residuary estate of Catherine James, her grandmother, which had been left in a testamentary trust with United States Trust Company of New York, hereinafter referred to as the Trust Company, as Trustee for the life of her mother, Fannie J. Anthony, who died on that day (R. 18, 130, 223, 226, 233, 131, 240, 241).

On May 26, 1936, said petitioner, at the direction of the Trust Company (R. 96, 148-149), signed and delivered to it a document called a receipt and release with an account attached, of its acts as Trustee, acknowledging the receipt by her of all the investments of the former trust fund in kind, and releasing the Trust Company from all its acts in relation to the items receipted for, when in fact none of the items receipted for were actually delivered (R. 96, 133-149).

The items of the trust fund so receipted for but not actually delivered included two participations in mortgages, one for $4,500 in a mortgage of $28,000, which it held on property on Third Avenue, and one for $10,000 in a mortgage on $110,000 which it held on property on Madison Avenue, both in New York City (R. 96, 138-139, 121, 187, 122, 190, 194-195). This document, however, was signed on the representation that these participations were excellent investments, and would be paid when due (R. 98, 150-151, 130, 227, 131, 258-259), and on the condition precedent that the said signed docu-

ment did not become effective until the delivery to said petitioner of assignments of said participations free from any agency on the part of the Trust Company to manage these participations (R. 96, 148-149, 98, 153-154). The petitioner had on several prior occasions refused the request of the Trust Company for powers of attorney to manage these participations (R. 96, 149, 113, 121, 187, 121-123, 190-191, 123, 199-201, 106, 178, 126, 216, 130, 234).

Contrary to her rights, the representation aforesaid, and contrary to the document of receipt and release (R. 137-139), and to the condition precedent aforesaid (R. 101, 153-154), the Trust Company and not petitioner (187 N. Y. 101 [mem.]) repudiating its undertakings delivered on June 8, 1936 (R. 159-163) merely a certificate stating that the said petitioner is the owner of a participation interest of $10,000 in a bond and mortgage of $110,000 on the property previously described, and purporting to retain absolute dominion over the participation to the exclusion of said petitioner the owner of said property (R. 123, 202-204).

This document signed only by the Trust Company (R. 123, 204-205) was rejected (R. 105, 170-171). All the other items of the trust estate, specifically enumerated in the document of May 26, 1936, delivered on June 8, 1936, were unreservedly accepted (R. 71-72, 74, 75, 78-79, 82, 86, 87, 90, 102, 103, 131, 242). Negotiations continued for the payment of these participations without prejudice to said petitioner's rights, during the course of which the Trust Company paid the $4,500 participation above described on which a similar certificate had been given (R. 105, 510-511), and unauthorizedly reduced the rate of interest on the $10,000 participation on two occasions, and altered the terms of the mortgage of the said participation against the express prohibition of said

petitioner (R. 125-127, 210-222, 63-64, 131, 247, 101, 107, 182-185).

On November 18, 1939 (R. 231) an action was brought in the Supreme Court, New York County for the conversion of the $10,000 participation, the only undelivered item of the former trust property, by the petitioner William D. Smith, as assignee of the petitioner Helen Van Zile Anthony (R. 130, 223-231).

The Trust Company served an answer (247) admitting that the said petitioner refused the request of the Trust Company for an agency and power of attorney to manage this participation (234), and that the document of May 26th above described was conditionally delivered, adding that the conditions were afterwards dispensed with (235), and as separate defenses the Trust Company pleaded release, account stated, and the statute of frauds (R. 130, 237-238).

Thereafter, the Trust Company on a motion for security for costs in the action alleged that the entire estate had been distributed, except the $10,000 participation involved in the action (R. 131, 242) and later on a motion for a bill of particulars in the action the Trust Company averred that it could not safely proceed to the trial of the action without a bill of particulars, admitting again that the receipt and release had been conditionally delivered (R. 131, 251-252). On the later motion the petitioners, Helen Van Zile Anthony and William D. Smith announced that they demanded a jury trial in the action and intended to examine the Trust Company before trial (R. 231, 255). A bill of particulars was accordingly served (R. 131, 257-262).

On January 9, 1940, two days before the aforesaid motions were presented in the Supreme Court action (R. 239, 249), the Trust Company filed a petition in the Surrogate's

Court, New York County, which, after alleging the creation of the trust above described, and its proceedings as Trustee thereunder (R. 15-18), added that the petitioner Helen Van Zile Anthony has claimed that the said instrument of May 26, 1936, never became effective, and is without consideration (R. 19-20). The action above described is then alleged. The interests of the above petitioners in the former estate are set forth as follows: Helen Van Zile Anthony owner of the entire remainder of the former trust property. William D. Smith assignee of cause of action for conversion, Jesse Van Zile Anthony as executor of life tenant, entitled to unpaid income due life tenant (R. 22).

The Trust Company prays that the validity and effect of the document of May 26, 1936, at issue in the Supreme Court action be determined. In the event that the said document should be determined to be invalid, that the account of the Trust Company, as Trustee, and a supplemental account of its proceedings subsequent to the account of May 26, 1936, "with respect to * * * the portion of the trust estate left in its custody after the distribution of all the assets of which final disposition could be made," be thereafter judicially settled (R. 23).

The account filed is identically the same as the account attached to the document of May 26, 1936, called a receipt and release (R. 24-61, 96, 143-146) and includes the participation involved in the Supreme Court action (R. 39). The supplemental account admits and affirmatively alleges that the $10,000 participation has not been delivered and that it still retains it, and records (R. 63-65, 67-68, 70), payments of the items set forth in the account of May 26, 1936, which were thereafter paid on June 8, 1936, and semi-annual payments of interest under the participation involved in the Supreme Court action, for which credit had been given in that action (R. 62-70, 130, 230-

231). These petitioners were cited pursuant to this petition (R. 21-23, 4-5).

Petitioners herein filed an answer to this petition demanding a dismissal of the proceeding on the ground that the Surrogate's Court was without jurisdiction in the premises, and alleged that all the items set forth in the accounts filed identically the same as the account of May 26, 1936, have been received by the parties named, and are unquestioned, except the undelivered $10,000 participation, concerning which a prior action is pending in which all the issues sought to be tried in the second proceeding are determinable, and have been put in issue by the Trust Company by its answer in the Supreme Court action, while on the contrary, the issues in the said Supreme Court action are not determinable in the Surrogate's Court action. All the acts complained of occurred while the Trust Company purported to act as custodian after its Trusteeship had ended, except the illegality of the investment in the $10,000 participation (R. 71-77). All the income due the life tenant has admittedly (R. 18) been paid to her executor (R. 75), who signed (R. 141), but did not and is not claimed to have attacked (R. 19-20) the instrument of May 26, 1936.

This answer is addressed solely to the jurisdiction of the Court to entertain the proceeding. It does not put in issue the participation in issue in the prior action or any item of the account which is done by filing objections to the account. The petition, account and objections, when filed, constitute the pleadings on the merits of the issues set forth in the petition and account. No objections were filed because obviously an answer to the merits would have been inconsistent with an application to dismiss for want of jurisdiction and the account was expressly withheld from settlement until the document of May 26, 1936, was declared invalid.

The Trust Company served a reply to that answer in which all these statements of the answer are admitted (R. 78-79).

The Trust Company then moved in the Supreme Court action, returnable in the Surrogate's Court, to transfer the trial of the conversion action from the Supreme Court to the Surrogate's Court.

The Surrogate who made the decree herein in a decision made in 1934 (*Matter of Pfersich,* 153 Misc. 609), annunciated the statutory limitation on the jurisdiction of the Surrogate's Court to try the issues of Supreme Court actions as follows:

By Section 40, subdivision 9 of the Surrogate's Court Act, authority and power is given to transfer law actions pending in other courts affecting the administration of estates to the Surrogate's Court.

A Supreme Court action under Section 190a of the Civil Practice Act can be transferred only by the Supreme Court in its discretion upon the prior order of the Surrogate, but right to a jury trial is preserved.

By Section 168 of the Civil Practice Act, provision is made to stay the Supreme Court action pending an application to transfer it to the Supreme Court.

By Section 41 of the Surrogate's Court Act jurisdiction is conferred over the parties to the Supreme Court Action after it has been transferred to the Surrogate's Court.

By Section 65 of the Surrogate's Court Act, authority is given the Surrogate's Court to consolidate the Supreme Court action after it have been transferred to the Surrogate's Court, with a pending accounting or other proceeding in the later Court.

The purpose of these enactments was to expedite distribution of an estate to creditors and beneficiaries which

might be delayed several years owing to the congested calenders in the Supreme Court.

The power thus conferred is to be used sparingly and only where injustice, delay and needless expense would result, if the transfer was not made.

See also *Matter of Pedrette,* 153 Misc. 106.

Therefore the Surrogate's Court has no power or jurisdiction to try a Supreme Court action or over the parties to such action until an order has been made by the Supreme Court directing the transfer of such action to the Surrogate's Court with all the attendant rights of a Supreme Court action including a jury trial. No order can be made transferring a Supreme Court action to the Surrogate's Court, unless there is a pending proceeding in the Surrogate's Court and the determination of the action is necessary for the completion of an estate (*Matter of Franklin,* 153 Misc. 110, 111).

The Surrogate over objection made an order giving his consent to the transfer of the action to that court (R. 184, 85-86, New York Law Journal, February 3, 1940, p. 550).

The Trust Company then moved in the Supreme Court for an order transferring the action to the Surrogate's Court (R. 80-81). This motion was opposed upon the ground *inter alia* that the jurisdictional issue under petitioner's answer in the Surrogate's Court was pending and undetermined.

(The text of Sections 40, subdivision 9, 41, subdivision 4 and 65 of the Surrogate's Court Act, and Sections 168 and 190 (a) of the Civil Practice Act is annexed as an appendix to this application with the applicable parts italicized for convenience.)

When the motion to transfer the action was still pending and undecided in the Supreme Court the Trust Com-

pany served notice of hearing ostensibly on the answer filed demanding a dismissal for want of jurisdiction, as that was the only issue raised by the pleadings and presumably to have that issue determined as a basis for the decision of the Supreme Court motion (R. 271).

At the opening of the hearing the petitioners uncontradictedly announced that the hearing was limited to the trial of the issues set forth in the answer demanding a dismissal of the proceeding (R. 80, 82-83, 86, 87-89, 110, 111) and delivered a trial memorandum to the Surrogate, and a copy to the Trust Company (R. 85) limited to a discussion of the issues raised by their answer.

Contrary to due process of law, the Trust Company with the acquiescence of the Surrogate, proceeded to try all the issues under the pleadings in the Supreme Court action (R. 107, 109-110, 119, 120) on a hearing restricted by the pleadings in the Surrogate's Court to a dismissal of the proceeding for want of jurisdiction over the objection of the petitioners (R. 97, 100, 110-111), although deprived of the right to fully set forth their position and objection on the record (R. 110-121, 101). It also proceeded to prove its account deferred by its petition until after the alleged release, in issue in the Supreme Court action was declared invalid (23), and unquestioned in any event by petitioner J. V. Z. Anthony, as to payments to him as executor of the life-tenant, the only item in which he had any interest, and to which no objections had been or could then be filed (R. 18, 75).

The petitioners involved were directed on the hearing to produce their evidence on the issues in the Supreme Court action of that day on that hearing on the application to dismiss on jurisdictional grounds (R. 110-111), without notice and to respect the Court's rulings (R. 121).

Attempting to divest the Supreme Court of its judicial powers, the Surrogate directed the Trust Company on

that hearing to notify the Supreme Court, *ex parte,* to sever the action, and send him that part which related to all the issues in the Supreme Court action prior to June 8, 1936, and to retain the balance of the issues after that date for trial in the Supreme Court (R. 112, 127, 128). Later, divesting the Supreme Court of its power, he ruled that without any order of the Supreme Court he would and did decide all the issues prior to June 8, 1936 (R. 127-128, 132, 267-268).

The Surrogate several days after the hearing (173 Misc. 1042) decided all the issues under the pleadings in the Supreme Court action as to all occurrences to June 8, 1936, the date upon which he held that the securities constituting the trust fund "capable of delivery" (R. 264), receipted for on May 26, 1936 (R. 113) had been actually delivered to the remainderman (137-140, 159-163, 266). The Surrogate held that the delivery of the $10,000 participation was evidenced by the delivery of a certificate stating that it held the participation (R. 6-7). The Surrogate further held that the Trust Company after June 8, 1936, was custodian and not trustee of the participation decreed as delivered but actually retained by the Trust Company (R. 84, 85, 102, 103, 112, 115, 118, 119, 268, 269) with all the arrogated powers previously described, and hence the Surrogate is without jurisdiction after that date (R. 6-7, 13-14) and held that the parties involved could carry on the conversion action as to all issues after June 8, 1936 (R. 108, 111, 112, 113, 116, 120, 127-129, 268).

In the absence of jurisdiction and of any pleadings in the Surrogate's Court, and denying the petitioners interested in the action a right to a jury trial and to any trial and to an examination before trial, and in the absence of any evidence, the Surrogate later and on May 17, 1940 (R. 4) made adverse findings of fact against

all petitioners in a decree purporting to settle the account of the trustee not in issue on all the issues in the Supreme Court action to June 8, 1936, thus taking from the interested petitioners $10,000 and accrued interest without due process of law (R. 4-14, 287).

Although the Surrogate ruled that the interested petitioners had the right to proceed in the original Supreme Court law action on all the issues after June 8, 1936, his decree adjudges that these issues were triable in a court of equity (R. 14). The decree punitively awards costs of a contested accounting in the sum of $304.47 against all these petitioners personally, although (R. 131-132, 14) the account was not in issue under the prayer of the petition (23) and no objections had been filed. The petitioners were present merely to demand a dismissal on their respective claims alleged in their joint answer and proved on the hearing and that the Surrogate's Court had no jurisdiction of any subject-matter presented.

On September 25, 1940, an order was made by the Supreme Court, on the application of the Trust Company and after petitioners' brief in the Appellate Division had been served withdrawing the motion to transfer the action to the Surrogate Court, still pending and undecided (*Smith vs. U. S. Trust Company,* New York Law Journal, September 26, 1940, p. 798, Levy, J.)

An appeal was taken to the Appellate Division of the Supreme Court, First Judicial Department, an intermediate Appellate Court, from the decree of the Surrogate. The Appellate Division made an order on May 2, 1941, affirming the decree appealed from without opinion (R. 276, 278). Two of the Justices joined in a dissenting opinion, holding that the proceeding in the Surrogate's Court should have been dismissed, for the following reasons: (1) the settlement of the accounts un-

der the petition of the Trust Company was not in issue because the settlement thereof was deferred until the document of May 26, 1936, in issue in the Supreme Court action was declared invalid (R. 280); (2) the Surrogate had no jurisdiction in the premises (R. 281); (3) a pending prior action barred the proceeding (R. 282-283); (4) all the issues involved between the parties were determinable in the Supreme Court action, and were not determinable in the Surrogate's Court (R. 283; (5) the proceeding in the Surrogate's Court was wholly unnecessary, and the interested petitioners should be permitted to proceed with the original action in the Supreme Court (R. 284-285). On the remittitur of the Appellate Division, a further decree was entered in said Surrogate's Court, affirming the said decree, and assessing costs against the petitioners in the sum of $139.43 (R. 277).

On May 29, 1941, the petitioners herein appealed to the Court of Appeals of the State of New York from the order of affirmance of the Appellate Division of the decree of the Surrogate's Court entered May 17, 1940 (R. 275). On the said appeal, when it first appeared that petitioners constitutional rights had been invaded, the petitioners argued and set forth in their briefs that by the proceedings had, the said petitioners had been unconstitutionally deprived of a jury trial and of any trial of the issues involved in the prior conversion action, and that the decree findings and adjudications were unconstitutionally made without any pleadings upon which to base them and were illegally made under the issues presented by the pleadings without jurisdiction and notice and unconstitutionally deprived the petitioners of a trial of these issues in the prior action and demanded a reversal on those grounds and the constitutional right to try the issues in the Supreme Court action. Although unnecessary to file specifications or assignments of error under the appellate prac-

tice prevailing in New York State, all the claims set forth in the following specifications of error were submitted in support of the foregoing constitutional claim (R. 290-294).

On November 28, 1941, the Court of Appeals made an order affirming the order of the Appellate Division in all respects, without opinion, and sending its remittitur to the Surrogate's Court of New York County to be enforced according to law (R. 285-286). On December 8th, 1941, the Surrogate's Court entered a decree on the remittitur and mandate of the Court of Appeals, which is the highest court of appellate jurisdiction in the State of New York, affirming in all respects the order of the Appellate Division, and the decree originally entered, and assessing costs against these petitioners in the sum of $177.80 (R. 286-288).

On January 5, 1942, the petitioners moved for a reargument of the said appeal in the Court of Appeals pointing out the Constitutional claims above asserted, specifically enumerating them, which had been made in the briefs on the original argument in that Court.

These petitioners on said motion reiterated their claim that the Fourteenth Amendment of the United States was relied upon in making these Constitutional claims, and that the infringement followed by a mere recital of the items of the claims without citation of any authorities, which was the reason for the inadvertent omission to cite the controlling authorities cited in the reargument brief (R. 289-294). The Trust Company did not contradict these averments by affidavit (R. 288-295) and clearly indicated that the petitioners' claim was based upon the Federal Constitution. The motion for reargument which record is lodged in the Court of Appeals, was denied on January 15th, 1942, without opinion (R. 295; 287 N. Y. [mem.]).

Specification of Error.

The petitioner, Helen Van Zile Anthony, owning the beneficial interest in the property involved, and her assignee, the petitioner William D. Smith, holder of the legal title thereto, were summarily divested of their property and of their right to a trial of the issues of an action brought by them in a court of competent jurisdiction by the following acts and adjudications of the Surrogate's Court of New York County, as affirmed by the Court of Appeals of New York State on a hearing limited by the pleadings to the trial and decision of an application to dismiss the Surrogate's Court proceeding, without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

1. Trying and deciding the issues of the conversion action pending in the Supreme Court, New York County under the pleadings in that action, without notice and without an order of the Supreme Court transferring the action to the Surrogate's Court, and without jurisdiction, with full knowledge that a motion was pending undecided in the Supreme Court to transfer the action to the Surrogate's Court.

2. Directing the Trust Company, *ex parte,* to notify the Supreme Court Justice before whom the motion to transfer the action was pending, to decide the motion as directed by him, and to make an order severing the Supreme Court action, and to send him all the issues in the prior action to June 8, 1936, and to retain the balance of the issues in the Supreme Court for trial in that court, and later deciding all the said issues in said conversion action in the Supreme Court without an order transferring the order of the Surrogate's Court, and without notice and without jurisdiction.

3. Settling the account of the Trustee which declared that the participation involved in the Supreme Court was undelivered and still in its possession and in the absence of any pleading in the Surrogate's Court, putting in issue any of the items of said account, and contrary to the petition of the Trust Company deferring judicial settlement of the account until after the alleged release was declared invalid without notice to the petitioners and without jurisdiction.

4. Consolidating the issues of the Supreme Court conversion action with a proceeding brought for the determination of the validity of an alleged release, and for a judicial settlement of account only after the alleged release was declared invalid, *ex parte* and orally upon said hearing, without the entry of an order and without notice to the petitioners and without jurisdiction.

5. Directing the petitioners involved in the conversion action impromptu and extempore on the said hearing to produce their evidence on the issues in the Supreme Court conversion action not in issue on that hearing, and on that day without notice to the petitioners, and in the absence of any order transferring the Supreme Court action to the Surrogate's Court and without jurisdiction.

6. Trying and deciding the issues in the said conversion action without order of the Supreme Court, with full knowledge that the application to dismiss the Surrogate's proceeding was in part based upon the ground that a prior action was pending in which all the issues between the parties were determinable, and were not in the proceeding brought in the Surrogate's Court, and without notice to the petitioners and without jurisdiction.

7. Finding on said hearing that the investment in the participation involved in the prior action was properly

made and administered, not in issue under the pleadings in the Surrogate's Court, and without jurisdiction.

8. Finding that the accounting and delivery of the document of May 26, 1936, were made without any representations as alleged in the complaint and bill of particulars in the Supreme Court action not in issue under the pleadings in the Surrogate's Court without evidence, and in the absence of any order transferring the action to the Surrogate's Court and without jurisdiction and without notice.

9. Finding on that hearing the propriety of the administration of all investments and the performance of the Trustee's duties to June 8, 1936, without notice, and not in issue under the pleadings, without evidence, and in the absence of any order transferring the Supreme Court action to the Surrogate's court and without jurisdiction.

10. Finding that the alleged release of May 26, 1936, is binding and conclusive to June 8, 1936, and that the remainderman receipted for the securities and agreed to receive the certificate of participation, and that the sworn statements in the complaint in the Supreme Court action that the document of May 26, 1936, was conditionally delivered, were fictitious, without evidence in the absence of the order previously described, and of any pleadings upon which to base the finding and without jurisdiction and without notice.

11. Finding that the receipt of June 8, 1936, discharged the Trust Company of all liability and constituted an acceptance of the certificate of participation not in issue under the pleadings, and without notice, and without a trial, and in the absence of any previously described order of transfer and without jurisdiction.

12. Finding that the remainderman is barred by the document of May 26, 1936, and that by the receipt of June 8, 1936, the remainderman agreed to accept the certificate of participation delivered, and that the decree is conclusive as to the validity of the document of May 26, 1936 to June 8, 1936, not in issue and without a trial and without jurisdiction and without notice.

13. Finding that the remainderman had been guilty of a breach of contract and perfidy with relation to the issues involved in the pleadings in the conversion action, in the absence of any pleadings and evidence and without jurisdiction and without notice.

14. Trying and deciding the conversion action in the absence of any order transferring the action to the Surrogate's Court without notice, with full knowledge that petitioners involved in said action claimed and were entitled to a jury trial of the conversion action and without jurisdiction and without notice.

15. Petitioner Jesse Van Zile Anthony as Executor of the life tenant, not a party to the conversion action and not interested in the account, was similarly deprived of his property by making the decisions and findings aforesaid against him.

16. Punitively awarding costs against all the petitioners of a contested accounting when the account was not and could not be put in issue under the prayer for relief set forth in the Trust Company's petition, and hence under a void decree similarly deprived them of their property.

Reasons for Granting the Writ.

The petitioners Helen Van Zile Anthony and William D. Smith, her assignee, have been deprived of a trial of issues framed in the action pending in the Supreme Court, New York County, without notice, and without jurisdiction, and contrary to the pleadings in the Surrogate's Court and by the decision and decree of the Surrogate's Court of the issues of the Supreme Court action under the pleadings in that action, have been barred from trying such Supreme Court action contrary to the due process of law provision of the Fourteenth Amendment of the Constitution of the United States, by which said petitioners have been deprived of their property.

All of the petitioners have been deprived of their property without due process of law and contrary to provision of the Fourteenth Amendment of the Constitution of the United States by the usurpation of jurisdiction by the Surrogate to try an issue not before it, by the imposition of costs of a contested accounting, when no contested accounting was before it and by the judgments for costs on affirmances of a void decree and in which petitioner Jesse Van Zile Anthony as Executor had no interest.

Dated, New York, February 23rd, 1942.

Respectfully submitted,

ELI J. BLAIR,
Counsel for Petitioners.